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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

JULIO C. BARRAGAN,

Defendant and Appellant.

B213481

(Los Angeles County  
Super. Ct. No. TA098928)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Eleanor J. Hunter, Judge. Affirmed.

Rachel Lederman, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant  
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Victoria B.  
Wilson and Noah P. Hill, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted Julio Barragan of one count of possession of a firearm by a felon, and one count of possession of ammunition by a felon. The trial court sentenced him to a low base term of 16 months in state prison for the firearm offense, and a concurrent low term of 16 months for the ammunition offense. We affirm the judgment.

### **FACTS**

On July 21, 2008, at approximately 1:25 a.m., Los Angeles Police Officer Ronald Cromwell initiated a traffic stop of an SUV after observing that it did not have its headlights on. As Officer Cromwell was stopping his patrol car behind the SUV, he saw a driver, later identified as Barragan, and two passengers in the back seat, later identified as Elias Zepeda and Luis Salcedo, and “noticed movements from the driver like towards the center of the vehicle,” leaning “down towards the floorboard and towards the right.” During the course of the ensuing events, Officer Cromwell asked Barragan for consent to search his vehicle, and “if he had anything in his vehicle [about which the officer] needed to be aware,” and Barragan said, “no, go ahead and search it.” When Officer Cromwell opened the center console of the SUV next to the driver’s seat, he found a loaded Baretta handgun, and a magazine containing 15 rounds. Officer Cromwell asked Barragan to whom the gun belonged, and Barragan answered, “it wasn’t the other two individuals who were in the vehicle with him.” Officer Cromwell took Barragan into custody at the scene. During a booking search, Officer Cromwell recovered a small notebook from Barragan. The notebook contained the phrases, “all gunshot,” “gun flashing” and “gun play” on a page labeled “Sunday.”<sup>1</sup>

In September 2008, the People filed an information charging Barragan with one count of possession of a firearm by a felon, and one count of possession of ammunition by a felon. At a trial by jury in November 2008, Officer Cromwell testified to the facts summarized in the previous paragraph. Zepeda testified in Barragan’s defense. According to Zepeda, he had been at a barbeque with Salcedo, Barragan and a man Zepeda knows as Capone. The barbeque broke up “late [at] night, like around 11:00 or

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<sup>1</sup> Officer Cromwell had stopped Barragan at about 1:25 a.m. on a Monday morning.

12ish,” and Barragan offered to drive the three men home. During the drive, Barragan stopped at a gas station, and got out of his vehicle to pump the gas. While Barragan was pumping the gas, Capone put a gun in the center console without telling Barragan. After Barragan finished getting gas, he drove Capone home. When Capone exited Barragan’s vehicle, he did not take his gun with him. Zepeda never told Barragan that Capone had put a gun in the center console. Barragan testified on his own behalf, and denied that he had known a gun was in his vehicle.

On November 6, 2008, the jury returned verdicts finding Barragan guilty of both counts. On January 8, 2009, the trial court sentenced Barragan as noted at the outset of this opinion. Barragan thereafter filed a timely notice of appeal.

## **DISCUSSION**

### **I. Instructional Issues**

Barragan contends that his convictions must be reversed because the trial court’s instructions were “inadequate to ensure that the jury did not convict [him] based on his mere proximity to the gun and ammunition.” We disagree.

#### **A. Barragan’s Forfeiture Of The Instructional Claims Is Excused**

Before addressing Barragan’s arguments that the instructions were “inadequate,” we must address the People’s contention that his failure to request clarifying instructions in the trial court has forfeited his claim on appeal. The People’s forfeiture contention is well-taken. “[A defendant] may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless [he or she] requested appropriate clarifying or amplifying language.” (*People v. Andrews* (1989) 49 Cal.3d 200, 218.) In other words, a “defendant is not entitled to remain mute at trial and scream foul on appeal for [a trial] court’s failure to expand, modify, and refine standardized jury instructions.” (*People v. Daya* (1994) 29 Cal.App.4th 697, 714.)

To avoid forfeiture, Barragan offers two arguments. First, he argues that a failure to request a clarifying instruction is excused when a trial court’s instructions, as given, resulted in a violation of a defendant’s right to due process by negating his or her right to have the jury determine “every material issue presented by the evidence.” (Citing *People*

*v. Shoals* (1992) 8 Cal.App.4th 475, 489-490.) Second, he argues that, if his instructional claim has been forfeited, then we should reverse his convictions for ineffective assistance of counsel.

Although the People's forfeiture position has merit, we choose to address the substance of Barragan's instructional claims on appeal because they implicate his substantial rights in that they raise the specter of a violation of his constitutional rights to due process and to the effective assistance of counsel. (*People v. Anderson* (2007) 152 Cal.App.4th 919, 927.)

## **B. The Trial Court's Instructions Were Not Inadequate**

### **1. The Instructions**

The trial court instructed regarding the count for possession of a firearm by a felon in accord with CALCRIM No. 2511 as follows:

"[THE COURT]: The defendant is charged in count 1 with unlawfully possessing a firearm. To prove the defendant is guilty of this crime, the people must prove that:

"Number one, the defendant possessed a firearm;

"Two, *the defendant knew that he possessed a firearm*;

"And three, the defendant had previously been convicted of a felony.

" [¶]. . . [¶]

"Two or more people may possess something at the same time. A person does not have to actually hold or touch something to possess it. It is enough if the person has control over it or the right to control it either personally or through another person." (Italics added.)

The trial court instructed regarding the count for possession of a firearm by a felon in accord with CALCRIM No. 2591 as follows:

"[THE COURT]: The defendant is charged in Count 2 with unlawfully possessing ammunition. To prove the defendant is guilty of this crime, the people must prove that:

“Number one, [the] defendant possessed or had under his custody or control ammunition;

“Two, *the defendant knew he possessed or had under his custody or control the ammunition*;

“And three, the defendant had previously been convicted of a felony.

“[¶] . . . [¶]

“Two or more people may possess something at the same time. A person does not have to actually hold or touch something to possess it. It is enough if the person had control over it or the right to control it, either personally or through another person.” (Italics added.)

## **2. Analysis**

Citing *People v. Jeffers* (1996) 41 Cal.App.4th 917 (*Jeffers*), Barragan contends that he was “entitled” to a “pinpoint instruction” on “unintentional possession.” We disagree.

*Jeffers* is inapposite to Barragan’s current case. In *Jeffers*, the Fifth District Court of Appeal reversed defendant’s conviction for possession of a firearm by a felon because (1) the trial court, “for some undisclosed reason,” failed to instruct on criminal intent with former CALJIC No. 3.30, and (2) “refused defendant’s pinpoint instruction” which would have told the jurors that, “[w]hen an ex-felon comes into possession of a firearm, without knowing that he has the firearm, and he later learns that he has a firearm, he does not automatically violate Penal Code section 12021(a) upon acquiring [the] knowledge . . . The ex-felon violates the law only if he continues to possess the firearm for an unreasonable time, without taking steps to rid himself of the firearm.’ ” (*Id.* at pp. 920-925.)

In Barragan’s current case, unlike in *Jeffers*, the trial court did instruct the jury on the subject of criminal intent using CALCRIM No. 250, formerly CALJIC No. 3.30, the instruction omitted in *Jeffers*. And Barragan did not, unlike in *Jeffers*, request a pinpoint instruction highlighting the knowledge element. Even apart from the contextual differences, *Jeffers* simply does not support Barragan’s proposition that a trial court

always has a sua sponte duty to give a pinpoint amplifying instruction on principles regarding knowledge when a defendant's defense is based on lack of knowledge. The standardized instructions given at Barragan's trial advised the jurors that the possession charges against him put the People to the task of proving he knew that he was possessing the unlawful objects, and no further amplifying instruction was required sua sponte.

Barragan next contends "[m]ere proof of access to or presence near contraband, without more, does not support a finding of unlawful possession." We presume that he also implicitly contends the trial court should have sua sponte instructed the jurors to the same effect. We agree with Barragan's statement of law, but find his abstract legal rule to be unhelpful in addressing his claim that the instructions at his trial were insufficient. The trial court's instructions at Barragan's trial did not suggest to the jury that his mere proof of proximity to the gun and ammunition could support a finding of guilt. On the contrary, the trial court plainly instructed the jury that knowledge was an element of the both possession crimes.

Finally, we are not persuaded to reach a different result based upon Barragan's argument that the prosecutor's closing argument to the jury compounded the trial court's "inadequate" instructions. According to Barragan, "the [prosecutor's] closing argument could have misled the jury into thinking that simply because [Barragan] was the driver and the items were found in the car, [unlawful] possession was established." He cites *People v. McNiece* (1986) 181 Cal.App.3d 1048, 1057 (*McNiece*), disapproved on other grounds in *People v. McFarland* (1989) 47 Cal.3d 798, 805, for this proposition.

*McNiece*, however, is not persuasive. In *McNiece*, the Fifth District Court of Appeal found that a prosecutor's closing argument may have misled jurors into the understanding that driving under the influence, by itself, could support a conviction on a charge of vehicular manslaughter with gross negligence. In such a context, "[i]t was necessary in all fairness" for the trial court to give a sua sponte instruction clarifying for the jurors that the element of gross negligence could not be supported solely by evidence which showed drunk driving. The prosecutor's argument at Barragan's trial was not of

the same nature, and, did not require, “in all fairness,” any sua sponte clarifying instruction on the element of knowledge of possession.

Barragan has not cited us to the specific parts of the prosecutor’s argument which he asserts “could have misled” the jurors. Further, upon reading the prosecutor’s entire opening and closing arguments, we have not found anything misleading. The prosecutor essentially argued that Barragan’s case came down to “who do you believe.” With that theme in mind, the prosecutor correctly noted that the People were required to prove both possession and knowledge of possession. The prosecutor’s comments about the presence of the gun in Barragan’s vehicle were in the context of the element of possession, and not in the context of the element of knowledge of possession. Indeed, on the latter element, the prosecutor urged the jurors to look at the circumstantial evidence — e.g., Barragan’s attempt to exit his car immediately upon being stopped, and his comments at the scene, “what he [didn’t] say” at the scene — in deciding whether Barragan knew the gun was in his vehicle. The prosecutor’s arguments did not, in our assessment, suggest to the jurors that they could convict Barragan based merely on the presence of the gun in his car. The record before us does not disclose a *McNiece*-type situation.

## **II. Ineffective Assistance of Counsel**

A convicted defendant’s claim that his lawyer’s ineffective assistance requires reversal of the conviction has two components. First, the defendant must show that his or her lawyer’s performance was deficient because it fell below an objective standard of reasonableness under prevailing professional norms. Second, the defendant must show that he or she suffered prejudice — i.e., that there is a reasonable probability that, but for the lawyer’s errors, the result of the defendant’s trial would have been different. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.)

Assuming without deciding that a lawyer’s failure to request a pinpoint instruction can establish constitutionally deficient performance where the instructions which the trial court did give were otherwise legally correct (Barragan cites no case directly making such a finding), we reject Barragan’s claim of ineffective assistance of counsel because his arguments on appeal do not persuade us that he suffered prejudice as a result. With or

without any amplifying instruction, the entire tenor of Barragan's case focused on the issue of whether or not he knew the gun and ammunition were in his vehicle. Barragan's defense counsel presented evidence on that issue, and vigorously argued it. The jury simply chose to accept the prosecution's opposing presentation of the evidence. We see nothing in the record to suggest that, had the jury heard a further instruction on the knowledge element, the outcome of Barragan's trial would have been different. We have no doubt the jury understood that Barragan's knowledge of the presence of the gun in his vehicle was the predominant issue. We see no reason to believe the jury may have equated mere proximity to knowledge.

**DISPOSITION**

The judgment is affirmed.

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BIGELOW, J.

We concur:

RUBIN, Acting P. J.

FLIER, J.